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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF MONTANA**
19 **MISSOULA DIVISION**

20 TANYA GERSH,)
21) Plaintiff,) No. CV 17-50-M-DLC-JCL
22 vs.)
23) **TRANSCRIPT 1 OF 2**
24 ANDREW ANGLIN,) **HEARING ON MOTIONS**
25) Defendant,))
and)
STATE OF MONTANA,)
Defendant-Intervenor.)
_____)

1 **BEFORE THE HONORABLE JEREMIAH C. LYNCH**
2 **UNITED STATES DISTRICT COURT MAGISTRATE JUDGE**
3 **FOR THE DISTRICT OF MONTANA**

4
5 Russell Smith United States Courthouse
6 201 East Broadway
7 Missoula, Montana 59802
8 Thursday, March 14, 2019
9 13:30:55 to 13:36:50
10 16:32:44 to 16:38:02

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25 Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

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APPEARANCES

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REPORTER'S NOTE: "Uh-huh" and "Um-hmm" indicate affirmative responses. "Huh-uh" and "Hm-umm" indicate negative responses.

PROCEEDINGS

(Open court.)

THE COURT: Good afternoon to everyone. Please be seated.

This, of course, is the time set for hearing upon several motions in the civil case of *Gersh v. Anglin*, Civil Cause 17-50-Missoula.

And I'm going to just begin on the plaintiff's side, right, with counsel identifying themselves for the benefit of the Court and the court reporter, please.

MR. DINIELLI: Good afternoon. David Dinielli of the Southern Poverty Law Center on behalf of the plaintiff, Tanya Gersh.

THE COURT: Thank you.

MS. LITTRELL: Good afternoon, Your Honor. Beth Littrell on behalf of the plaintiff, Tanya Gersh.

MR. MORRISON: John Morrison, Your Honor, on behalf of the plaintiff.

MR. COCHENOUR: Good afternoon, Your Honor. Matt Cochenour on behalf of the intervenor, State of Montana.

THE COURT: Okay.

MR. SCHOWENGERDT: Good afternoon, Your Honor. Dale Schowengerdt on behalf of Montana.

THE COURT: And for the defendant, please?

MR. RANDAZZA: Good afternoon, Your Honor. Marc

1 Randazza on behalf of the defendant.

2 MR. STEVENSON: Good afternoon, Your Honor. Mat
3 Stevenson on behalf of the defendant.

4 THE COURT: Good afternoon to all of you.

5 As you know, we're here; this hearing was set with
6 respect to three motions that were pending as of February 14
7 of 2019. There was the plaintiff's motion, Ms. Gersh's motion
8 to compel defendants to respond to requests for production and
9 for sanctions.

10 And my review indicates to me that there were how
11 many requests for production served in this? 123 or so?

12 MR. DINIELLI: Your Honor, that's about correct. I
13 know it was over a hundred.

14 THE COURT: Um-hmm.

15 MR. DINIELLI: I can look to determine the precise
16 number.

17 THE COURT: No, that's fine, as long as we're -- we
18 can operate in the ballpark for now. And that's Document 123.

19 The second motion is plaintiff's motion to enter a
20 protective order governing "confidential" and "highly
21 confidential" information. We'll be talking about the
22 distinction there. But that's Document 132.

23 And then, of course, Mr. Anglin's attorneys on his
24 behalf filed a motion to compel plaintiff to respond to
25 interrogatories and requests for production. That's

1 Document 134.

2 After I entered the order, within a short period of
3 time, then, there was a subsequent motion filed for a
4 protective order on behalf of Mr. Anglin with respect to the
5 plaintiff's noticing and ultimately taking the deposition of
6 Anglin. So even though that wasn't noted in my order, I
7 intend to deal with that motion in the course of our hearing.

8 Now I think if I'm right, too, the defendants served
9 78 requests for production. Is that about ballpark, too?

10 MR. RANDAZZA: That sounds right, Your Honor.

11 THE COURT: Okay. So there's a lot of requests for
12 production. You folks want to get a lot of information, I
13 guess understandably.

14 The thing that bothered me when I read through the
15 motions is that, first of all, I'm a big believer in meet and
16 confer, and given the number of attorneys I have here, of
17 course, and the number of motions that I have, this is a
18 significant case, certainly, from both parties' viewpoints.
19 But I'm told that, "Well, we attempted to confer and resolve
20 some of these matters telephonically." And then, of course,
21 which is not uncommon, "We have very comprehensive
22 correspondence." And, of course, not much headway was made in
23 any of those endeavors.

24 So whenever someone asks for sanctions in my court,
25 I take that very seriously, not just for the immediate

1 ramifications of a request for sanctions but the long-term
2 ramifications with respect to all attorneys involved in the
3 practice, because I do know, if you apply for *pro hac vice*
4 status in this court, and every court, or you apply for
5 admission to a bar, you've got to set forth every time you're
6 sanctioned. So I know you're not using the request for
7 sanctions loosely. I would never suggest that. But, again, I
8 take it seriously.

9 So I'm going to give this my very best effort, these
10 motions. I've obviously read through them. And what I'm
11 going to do, though, at the outset here is I'm going to put
12 you folks -- I'm going to give you the opportunity, if you
13 will, to meet and confer, because I don't think you have
14 sufficiently, in my view.

15 So what I'm going to do is give you an accommodation
16 in our jury room on the second floor. The clerk will show you
17 up there. And you're going to meet from 1:30 to 4 o'clock.
18 Then I will reconvene with you at 4 o'clock to see if you've
19 made any progress. I may have some short argument in terms of
20 progress.

21 Then I want to take the evening to digest what I
22 hear from you, and then we'll meet tomorrow morning at
23 9 o'clock.

24 And we'll continue down this road, and we'll go over
25 these things one at a time, and then we'll see what progress

1 we make. If we make progress, good. If we don't, then I'll
2 make a ruling. But I may have you back on Monday so that we
3 can see -- so I can get a full flavor of your arguments and
4 make an informed decision. Because if I'm looking at 130-some
5 interrogatories -- or requests for production on one side,
6 that's a lot of material; 78 on the other side, that's a lot
7 of material; sanctions with regard to each of those requests,
8 that's important to me that I get it right.

9 So that's my game plan here. And, again, I will
10 have the clerk show you to the jury room. I'll reconvene with
11 you at 4 o'clock.

12 The Court stands in recess.

13 THE CLERK: All rise.

14 (Discussion off the record.)

15 THE COURT: I would say that in your conversations,
16 both sides, interestingly, tell me the other side is using
17 boilerplate objections. And you describe for me, both sides,
18 what's wrong with a boilerplate objection, yet both of you use
19 them, which is curious to me, so maybe you can talk about that
20 and explain that to me later.

21 (Recess taken from 13:36:50 to 16:32:44.)

22 (Open court.)

23 THE COURT: Good afternoon, again. Please be
24 seated.

25 All right. Let me begin with the plaintiff, whoever

1 wishes to speak to me. I'm assuming it will be Mr. Dinielli
2 but not necessarily.

3 MR. DINIELLI: Yes, Your Honor.

4 THE COURT: Tell me what I need to resolve here.

5 MR. DINIELLI: Thank you very much.

6 We have made very substantial progress in the hours
7 we spent in the jury room. We got through the entirety of the
8 defendant's motion to compel with one exception. We also have
9 gotten through a substantial portion of the plaintiff's motion
10 to compel; we've gotten through Request No. 29.

11 We think we would benefit from even more time, and,
12 in order to do that, we would like to come back tomorrow
13 morning and resume our in-person conversations.

14 THE COURT: All right.

15 MR. DINIELLI: At this time, it does appear there
16 may still be some issues that we cannot reach agreement on.
17 One, for example, may be the applicability of the clergy
18 privilege to three items on our privilege log.

19 We also have not yet reached resolution with respect
20 to the location of the deposition, although conversations
21 continue.

22 THE COURT: Let me -- I don't want to interrupt you,
23 and I will give you the time tomorrow to continue, but I do --
24 with regard to the deposition, tell me what the hangup is,
25 because it seems to me, under Rule 45(c), my authority is

1 limited. Would you agree with that --

2 MR. DINIELLI: Well --

3 THE COURT: -- in terms of -- well, he still has to
4 be subject, Mr. Anglin, to a subpoena, correct?

5 MR. DINIELLI: We don't think he has to be subject
6 to a subpoena. We think --

7 THE COURT: What's Rule 45(c) say?

8 MR. DINIELLI: One of the things that we think could
9 happen, frankly, is Your Honor could order him to appear here
10 in the courtroom for a deposition.

11 THE COURT: Under what authority?

12 MR. DINIELLI: The ability to control the conduct of
13 the discovery. We know that the Court has the authority to
14 make rulings with respect to the timing and the location, and
15 we think that encompasses the location of the deposition.

16 THE COURT: Okay. Well, this evening, take a
17 look -- maybe I'm misreading Rule 45(c). Take a look at
18 45(c), which I read to say I have the power to issue a
19 subpoena within 100 miles of any person. But we're looking at
20 the next subsection, (b), which gives me the authority to
21 issue a subpoena for purposes of trial or a deposition within
22 the state where the person resides.

23 MR. DINIELLI: We'll take a look back at that,
24 Your Honor.

25 THE COURT: Okay.

1 MR. DINIELLI: As I said, we may be reaching
2 resolution --

3 THE COURT: Okay.

4 MR. DINIELLI: -- in any event, but we'll take a
5 look at that tonight.

6 THE COURT: All right. And I interrupted you. Go
7 ahead and continue.

8 MR. DINIELLI: The final issue on which we have not
9 yet reached resolution is the set of terms that should be
10 incorporated in the umbrella protective order. However, one
11 of the key points relates to exactly the way in which SPLC is
12 organized; whether, for example, people who are investigators
13 have access to documents that are maintained within the legal
14 department. We met and conferred about that in connection
15 with a claim of privilege, and we may be able to continue that
16 discussion and come back to the Court with an agreement on the
17 proposed umbrella protective order.

18 THE COURT: All right.

19 MR. DINIELLI: Because of the fact, though,
20 Your Honor, that we have made a lot of very specific
21 agreements with respect to particular limitations, to
22 particular requests, particular searches or questions that the
23 defendant is going to pose to his client, we would propose
24 that, at the conclusion of this meet and confer tomorrow, the
25 parties prepare a report to submit to the Court rather than

1 trying orally to put what we have agreed to today on the
2 record. We think it would be more beneficial, moving forward,
3 for us to agree on paper.

4 THE COURT: Do I need to tie you down in that jury
5 room to do that on paper? Because once you get to your
6 various spots, we're not going to have anybody reneging, so to
7 speak.

8 MR. DINIELLI: We will do our darnedest --

9 THE COURT: Okay.

10 MR. DINIELLI: -- but I want to say we think that's
11 the better approach.

12 THE COURT: I'm okay with that.

13 MR. DINIELLI: Thank you.

14 THE COURT: Just tell me the one exception you
15 mentioned with regard to the defendant's motion to compel.

16 MR. DINIELLI: That has to do with the applicability
17 of the clergy privilege with respect to emails between our
18 client and her rabbi.

19 THE COURT: Okay.

20 All right. Then I want you all here at -- you can
21 come when you want, no later than 10, and then the clerk will
22 show you to the jury room and you can continue your
23 discussions. But I don't think I have to meet with you in the
24 morning.

25 MR. DINIELLI: We agree with that, Your Honor.

1 There is one more clarification. We'd like to
2 request that there be relief from the requirement of in-person
3 attendance by local counsel. I know that my cocounsel, for
4 example, was not planning to spend the night and lives quite
5 far away.

6 THE COURT: That's fine. I relieve local counsel
7 from having to be here.

8 MR. DINIELLI: Thank you, Your Honor.

9 THE COURT: All right.

10 Good. I'm glad you made progress. I'll stand in
11 recess until tomorrow, and I'll wait to hear from you folks as
12 to when you want to reconvene in court. All right?

13 Thank you. The Court stands adjourned for the day.

14 THE CLERK: All rise.

15 (Proceedings were recessed at 16:38:02.)

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REPORTER'S CERTIFICATE

I, JoAnn Jett Corson, a Registered Diplomate Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 18th day of March, 2019.

/s/ JoAnn Jett Corson

JoAnn Jett Corson
United States Court Reporter